Calendar No. 532

97TH CONGRESS, 2d Session } SENATE { REPORT No. 97-392

# POSTAL SERVICE AMENDMENTS OF 1981

MAY 13 (legislative day, MAY 11), 1982.—Ordered to be printed

Mr. ROTH, from the Committee on Governmental Affairs submitted the following

## REPORT

[To accompany S. 1407]

The Committee on Governmental Affairs, to which was referred the bill (S. 1407) to amend title 39, United States Code, by strengthening the investigatory and enforcement powers of the Postal Service by authorizing inspection authority and by providing for civil penalties for violations of orders under section 3005 of such title (pertaining to schemes for obtaining money by false representations or lotteries), and for other purposes, having considered the same reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

### BACKGROUND

According to testimony by the Chief Postal Inspector before the Subcommittee on Civil Service, Post Office, and General Services, false representation schemes using the mails involve hundreds of millions of dollars annually in consumer losses. Moreover, the Chief Postal Inspector cited schemes receiving $20,000 a day. The Mail Order Consumer Protection Amendments of 1982, S. 1407, is a bill designed to give adequate tools to the Postal Service to enforce current statutes designed to protect consumers from such losses.

Mail order shopping is estimated to be a $25 billion dollar business annually. It represents a convenient, easy, and energy-saving method of obtaining goods and services. The vast majority of mail order firms are responsible businesses, providing a purchasing alternative to consumers. Unfortunately, unscrupulous firms also exist, and those firms represent a genuine threat to unsuspecting consumers. The Post Service's Inspection Service has major responsibility for combating such false representation schemes.

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Kenneth H. Fletcher, Chief Postal Inspector, described the Inspection Service to the Subcommittee as follows:

> The Postal Inspection Service is the investigative arm of the United States Postal Service. It has investigative jurisdiction over all violations of Federal criminal laws relating to the Postal Service. The Postal crimes with which the inspection service must contend fall into two broad categories: First, those actions which involve a criminal attack upon the Postal Service or its employees such as armed robberies, burglaries, theft of mail, and assaults on postal employees; and, second, those which involve criminal misuse of the postal system itself such as the mailing of bombs or pornography and, of course mail fraud.
>
> The magnitude of these responsibilities is in direct proportion to the size of the Postal Service itself, which last year handled just over a hundred billion pieces of mail, and has about 650,000 employees, over 40,000 postal facilities, and cash income of about $18.7 billion.
>
> The Inspection Service also has responsibility for internal audit in the Postal Service and for providing for the security of postal facilities and postal employees. To meet these responsibilities, we have about 2,000 postal inspectors; a uniformed postal security force of approximately 2,500 people: a variety of other support and administrative personnel; and six crime laboratories strategically located throughout the United States.

Regarding mail order consumer problems, Mr. Fletcher said:

> The Inspection Service currently receives an average of about 200,000 mail fraud complaints each year. From October 1980 through June 30, 1981, we initiated over 2,100 mail fraud investigations. In relation to those varied responsibilities I previously described, the Inspection Service devotes 20 percent of its time to combating mail fraud.

Mr. Fletcher described current efforts to combat mail fraud as follows:

> While we feel successful criminal prosecution in these types of cases serves as a deterrent to others, the conviction of the offender is often of little solace to those who lost their money. The ideal solution is, of course, to prevent individuals from being victimized in the first place.
>
> We believe a substantial reduction in crime can be accomplished through a combination of public awareness and a lessening of opportunity for the criminal. We think the efforts of this subcommittee in holding this hearing are very helpful in increasing public awareness.
>
> In an effort to heighten public awareness of mail fraud schemes, we have selected and trained inspectors as consumer protection specialists. They have appeared on hundreds of radio and TV interview programs—have addressed thousands of civic and consumer groups, as well as prepared articles for numerous newspapers and magazines. We have also prepared several brochures which address specific type schemes.

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In addition, the Inspection Service contacts newspaper and magazine publishers to advise them of action taken by the Postal Service against fraudulent work-at-home and medical schemes which were promoted through advertisements placed in their respective publications.

Where frauds have been committed, we used a two-pronged attack. Criminal prosecution is considered under title 18, United States Code, Section 1341 (the mail fraud statute). This is one of the Nation's older consumer protection laws. The law is quite simple but very broad. Essentially, whoever uses or causes the mails to be used in a scheme to defraud is in violation of the mail fraud statute.

Additionally, we consider administrative action under title 39, United States Code, Section 3005. This section permits the Postal Service, upon proper showing before an administrative law judge, to withhold and return to the sender, mail addressed to anyone who solicits monies through the mail by false representations. In addition, the Postal Service may request the U.S. District Court in the area where the promoter receives mail to issue a temporary restraining order under title 39, United States Code, Section 3007. This restraining order stops the delivery of mail until the administrative law judge renders a decision. In FY 1981, we initiated administrative action against 454 various promotions nationwide.

According to Mr. Fletcher, S. 1407 will provide valuable tools to enforce the false representation statute:

The bill would correct a serious oversight in current law by giving to the Inspection Service the same investigative demand authority granted to the Inspectors General. This would not be a regulatory power but rather the means by which to more efficiently and effectively fulfill existing responsibilities. This authority, if granted, would greatly assist the Inspection Service in both criminal and administrative investigations by enabling us to gain access in a timely fashion to books, records and documents relevant to the offense under investigation. Only the appropriate Federal District Court would have authority to compel compliance or impose sanctions upon those who unreasonably fail to comply with an investigative demand issued by the USPS.

The legislation would likewise provide for more expeditious enforcement of the administrative statutes by eliminating what we presently perceive as two weaknesses, one of which is our inability to quickly obtain samples of advertised products. Many deceptive operators are aware of our "test purchase" investigative procedures and delay shipping the products until they believe that they have realized the maximum return on their promotion. Moreover, common mail-order marketing techniques involve "one-shot" advertising—for example, the familiar full-page Sunday supplement ads—which will draw responses for only a very short time. The needed authority which this bill would provide is simply to

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require the vendor to sell the product to the Postal Service upon demand and the tender of the advertised purchase price.

Another weakness in section 3005 which would be remedied by this proposed legislation is the lack of any sanction to discourage operators from circumventing an outstanding false representation order. Fraud operators often simply modify their business names or change their addresses and continue to sell the same product under the same false representations. Presently, we must initiate administrative proceedings each time the promoter renews the activity under a different name. And each time, the promoter keeps getting the consumer's money until a new proceeding can be brought and a new order obtained. Your bill would authorize a civil penalty of up to $10,000 a day for those operators who evade or attempt to evade the effect of an order.

Additionally as Postmaster General Bolger noted in his written comments to the committee on the bill:

> Such authority would enhance the effectiveness of the misrepresentation statute by enabling it to be applied to schemes which are, at present, virtually immune. For example, false billing schemes, where the promoter mails out bills stating or implying some pre-existing obligation of the addressee to pay, are currently difficult to prove because the promoter is able to contend that the relatively few complaints allegedly representing the scheme are mere aberrations. Access to the promoter's books and records would reveal whether the claimed pre-existing obligations existed. In addition, mail order merchants who systematically fail to deliver merchandise within limits expressed or implied by their advertising or who fail completely to honor some portion of the orders they solicit and receive may contend that the product was delayed or lost in the mails. In these and other cases where the facts necessary to prove or disprove a case are in the exclusive possession of the promoter or some person who does not choose to cooperate, the proposed demand authority would greatly improve the likelihood of reaching the truth.

## Statement

The committee believes that S. 1407, as amended, would significantly improve the ability of the Postal Service to deal with mail-order schemes which defraud the public through false representations.

S. 1407, as amended, would authorize improved investigation authority by giving the Chief Postal Inspector (who functions as the Inspector General of the Postal Service) authority to seek access to any books, records, documents or other matter related to an investigation through a written investigative demand. Written demand authority to be used in this manner currently can be found in several existing statutes including section 20 of the Federal Trade Commission Act (15 U.S.C. § 57b); Section 3 of the Antitrust Civil Process Act (15 U.S.C. § 1312); and the Inspector General Act of 1978 (5 U.S.C. App. § 6(4)) which applies to more than a dozen agencies.

The primary use of section 2 of S. 1407, as amended, would be in cases arising under 39 U.S.C. § 3005. The Postal Service has informed the committee that this authority would also be helpful in the investigation of "mailability" cases arising under 39 U.S.C. § 3001. Moreover, this authority would provide the Postal Service with authority equivalent to the Inspectors General of other agencies to investigate false claims, fraudulent practices, embezzlement and similar activities against the Postal Service by its employees or contractors, or any other postal offense such as mail fraud (18 U.S.C. § 1341).

Because this investigative tool is new for the Postal Service, S. 1407, as amended, requires the Postal Service to propose for public comment rules to govern the issuance and reasonable use of investigative demand authority. It is expected by the committee that the Postal Service will restrict authority to issue demands to designated management employees and to explain on the face of the demand the rights and obligations of the party being served with the demand. Through the notice and comment requirement added by the committee, rules adopted through this process should take into account the public's view as to the reasonable use of the authority.

The exclusion from investigative demand authority of matters pertaining to Chapter 6 of title 39 and provisions of title 18 which are part of the private express statutes, reflects the committee's determination that appropriate authority presently exists for investigations under these provisions.

The Postal Service has advised the committee that it contemplates proposing rules to govern the issuance of demands under section 2 which would differentiate, quite appropriately, between persons who are targets of investigations and third parties.

In order to require compliance with a written investigative demand the Postal Service must obtain a court order. In such proceedings the reasonableness of a demand could be challenged and the district court asked to determine whether the demand is an unreasonable burden on a party, is sufficiently specific as to the time, place and items involved, whether it relates to a matter under statutory authority given to the Postal Service, and whether it is otherwise appropriate. The court would also be responsible for determining whether the rules adopted by the Postal Service regarding the use of this authority were complied with.

In addition to the Postal Service's initiation of district court proceedings in which a party could challenge the reasonableness of the demand, the sufficiency or appropriateness of a demand could also be tested by a party's request to a district court to quash or modify the demand under 28 U.S.C. § 1651. Additionally, the person or corporation against whom the demand was issued could request that the district court require that the documents be sealed or otherwise kept confidential. (A similar request could be made of the administrative law judge in the subsequent administrative proceedings pursuant to 39 U.S.C. § 3005.)

Under S. 1407, section 3005(d)(1), as amended, the Postal Service would be granted authority to tender the advertised price to a firm in order to gain immediate access to an advertised product so that an examination of the product or service could begin immediately. If the

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United States district court finds that there has been an unreasonable failure by any person to provide the requested article or service, such failure would contitute probable cause, for purposes of section 3007, that such person is using the mails in the furtherance of a misrepresentation scheme.

Likewise, under section 3005(d)(2), if the United States district court finds that there has been an unreasonable refusal by any person to comply with a written investigative demand, such refusal would constitute probable cause for purposes of section 3007 that such person is using the mails in furtherance of a misrepresentation scheme.

It is important to note the specific sanctions this section addresses. The sole sanction of an unreasonable failure to provide an article or an unreasonable refusal to comply with a demand for documents under subsections 3(d)(1) and 3(d)(2) would be an order, issued by the district court, to allow the Postal Service to detain mail pursuant to 39 U.S.C. § 3007. No administrative sanction is provided for unreasonable failure to comply with these demands.

It is also important to note that much of the text of this bill is contained in current statutes. With the exception of the new cease and desist authority (see section 3(b)(2)) and the provisions relating to unreasonable refusals to comply with written demands or failures to provide articles, the bill, as amended, makes little change in the existing false representation section (39 U.S.C. § 3005) that provides authority for stop orders and defines the scope of prohibited conduct. This legislation does not expand or reduce the scope of false representations matters. Its changes deal only with procedures used when such cases arise.

Mail stop orders and the proposed cease and desist orders could only be issued by the Judicial Officer of the Postal Service following the procedures required by 39 C.F.R. Part 952. The mail stop orders would continue, as at present, to be directed to postmasters as only they could "stop" mail. The cease and desist order authorized by section 2(b)(1) would be directed only against the promoter of the scheme or his agent in order that, upon resumption of the scheme, he would have been under prior notice and obligation to refrain from conduct which would give rise to the civil penalties proposed by section 4 of S. 1407, as amended.

Section 4 of S. 1407, as amended, would greatly improve enforceability of the false representation statute by providing for the imposition of civil penalties where appropriate. Such penalties, which are modeled after similar FTC authorization should serve as a deterrent to those who would evade orders issued under section 3005. Section 4 of S. 1407, as amended, would authorize the United States district court to impose a civil penalty for each violation of a cease and desist order by a person subject to the order or by any person, except publishers of newspapers and periodicals, having actual knowledge of the order and in privity with the person whose conduct was subject to the order.

Civil penalties would be determined by a U.S. district court judge in an amount not to exceed $10,000 for each day that such person engages in prohibited conduct. Whenever the Postal Service, acting through the Department of Justice, finds that any person is engaged in such conduct, the Postal Service may commence a civil action to enforce the civil penalties established under section 4 of S. 1407, as amended. The

committee emphasizes that the $10,000 amount per day serves as a ceiling on the penalties imposed, and in determining the amount of a civil penalty, the court under the bill is to take into account the nature, circumstances, extent, and gravity of the violation. With respect to the violation, the statute further provides that the court take into account such factors as ability to pay, effect on ability to conduct lawful business, any history of prior such violations, the degree of culpability and such other matters as justice may require.

The committee believes that penalty proceedings would most appropriately be conducted by the district court rather than administrative law judges and S. 1407, as amended, so provides.

The committee substitute provides that authority regarding imposition of a penalty would be vested exclusively in the district courts, and the necessary proceedings would have to be initiated by the Postal Service, as provided by section 3012(d).

Furthermore, the bill provides that in a situation where a person or corporation who received money or property by mail through a scheme and previously was held to violate 39 U.S.C. § 3005, resumes the same scheme through the use of any instrumentality of interstate commerce, e.g., credit card charges placed by telephone in lieu of receiving payment by mail, such party would be subject to noncompliance proceedings under proposed section 3012.

It is important that the rights of parties against whom civil or criminal proceedings are initiated be protected. At the beginning of an investigation of false advertising by mail, according to the Postal Service, it often is not possible to determine whether statutory provisions of title 39 or title 18 may apply. The focus of sections 3005 and 3007 of title 39 is to promptly terminate any scheme involving losses through false representations. The focal concern of 18 U.S.C. § 1341 is intentional attempts to defraud by use of the mails. Information obtained through investigation of a section 3005 case could be used in a subsequent criminal proceeding subject to the court's protection of the defendant's rights. See *United States* v. *Euge*, 444 U.S. 707 (1980). Once a criminal case has been presented to a grand jury, investigation would be conducted through the grand jury and not through use of the investigative authority provided in S. 1407.

S. 1407 as amended, also amends section 2401(g) of title 39, by requiring the Postal Service to include in its annual comprehensive statement to the Congress a report on its investigative activities, including a summary of matters referred for prosecution and the results thereof, the number of investigative demands issued, and a summary of administrative and civil actions initiated. The committee believes that such matters are subjects which should be closely monitored by the Congress.

Two further matters require specific attention. First, it should be noted that inasmuch as this legislation anticipates litigation, all matters related to litigation, including applications for enforcement, of written investigative demands will continue to be governed by existing statutory relations between the Postal Service and the Justice Department under 39 U.S.C. § 409(d).

Secondly, during the committee's deliberations, questions were raised about the Postal Service's enforcement of the false representa-

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tion statute in cases involving advertisers of books. The committee recognizes the sensitivity of such matters because of the protections provided by the First Amendment against government restrictions on the press. At the same time, false representations by book advertisers can result in serious and substantial losses to consumers. An examination of this matter is therefore appropriate.

The committee was advised of a policy established by the Federal Trade Commission with respect to Commission action against false advertising in the sale of publications. It was suggested that this policy—the so-called "Mirror Image Doctrine" (36 Fed. Reg. 13,414, July 21, 1971)—be incorporated in 39 U.S.C. § 3005 as a limitation upon Postal Service enforcement of 39 U.S.C. § 3005 against mail order sales of publications.

The FTC's formulation of the "Mirror Image Doctrine" provides:

> The Commission as a matter of policy, ordinarily will not proceed against advertising claims which promote the sale of books and other publications: Provided, the advertising only purports to express the opinion of the author or to quote the contents of the publication; the advertising discloses the source of statements quoted or derived from the contents of the publication; and the advertising discloses the author to be the source of opinions expressed about the publication. Whether the advice being offered by the publication will achieve, in fact, the results claimed for it in the advertising will not be controlling if appropriate disclosures have been made. The policy does not apply, however, if the publication, or its advertising, is used to promote the sale of some other product as part of a commercial scheme.

The committee believes the "Mirror Image Doctrine" is a reasonable attempt to articulate a balancing of these rights. Indeed, in the view of the Postal Service its policy regarding enforcement against false advertising in the sale of publications is consistent with the "Mirror Image Doctrine." The "Doctrine" clearly precludes interference with the honest and forthright advertisement of unpopular, unorthodox or invalid opinions and ideas. As can be seen from the FTC's formulation of the doctrine, however, it is not readily stated in hard-and-fast language, and instead requires considerable flexibility for the exercise of judgment and discretion in dealing with particular facts.

The committee believes, however, that the federal courts are the best arbiters of the proper balance in this area to protect First Amendment rights. The committee is concerned that an attempt at codification of one particular statement of this "Doctrine" in suitable legislative form might be too inflexible to suit actual and changing fact situations as advertising practices change. We think it wise to depend instead on the ability of the courts to assure that an appropriate balance has been struck in each of these cases, and on continued legislative oversight to see that Postal Service administration of the statute comports with Congressional intent.

While the committee, therefore, does not recommend enactment of the "Mirror Image Doctrine" as part of 39 U.S.C. § 3005, it believes that publishers are entitled to expect that thet Postal Service will act consistently with the "Doctrine" unless and until the courts conclude

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that the Postal Service should adhere to more or less restrictive standards.

Finally, it may be useful to provide the following illustration which outlines the intended procedures established by sections 2, 3, and 4 of S. 1407, as amended, to provide a complete understanding of their interrelationship.

Assume that an advertisement offering electronic computer games for sale through the mails, at retail prices substantially below usual discount retail prices, is brought to the attention of the Postal Inspection Service. Informal inquiries to wholesalers establish that the advertised price is below wholesale cost and establish a basis for suspecting that the seller has no inventory or capacity to furnish the product at the advertised price. Under present law, the Inspection Service would have to make a mail order "test purchase" to verify the advertising claims—a process which could take a month or more depending upon the seller's willingness promptly to fill the order. Under sections 2(a) and 3(d)(1), the Inspection Service could present the seller with a written demand to examine his inventory records and attempt to make an immediate, in person, test purchase.

If these efforts are refused by the seller, sections (d)(1) and (2) would allow the Postal Service, through the Justice Department, to seek an order from a district court allowing the Postal Service to detain mail in response to the advertisement pending completion of the 39 U.S.C. § 3005 administrative hearing on the merits. Proceedings pursuant to section 3005 would be initiated by the filing of a formal complaint with the Judicial Officer of the Postal Service. The complaint would be served upon the seller and assigned to an administrative law judge for formal adversary hearings pursuant to the Administrative Procedure Act (See 39 C.F.R. Part 952). Following the administrative hearing, the administrative law judge would issue a written Initial Decision recommending (or not) the issuance of a "mail stop order" pursuant to 39 U.S.C. § 3005(a). The Judicial Officer would review the entire record and issue (or not) the recommended order. Under section 3(b)(2) the Judicial Officer would also be authorized to order the seller to cease and desist from continuing the misrepresentation scheme. Either order would be subject to judicial review. If the seller had previously been ordered to cease and desist, section 4 of the bill would allow the Postal Service to seek a civil penalty in the district court for violation of the cease and desist order.

## Major Provisions

The purpose of S. 1407, the Mail Order Consumer Protection Amendments of 1982, is to strengthen the authority of the United States Postal Service in protecting consumers against fraud and misrepresentation perpetrated through the mails. The major provisions of this measure would amend title 39 of the United States Code in the following ways:

First, this measure would give the Chief Postal Inspector (who functions as the Inspector General of the Postal Service) authority to seek access to any books, records, documents or other matter related to an investigation through a written investigative demand.

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Second, the Postal Service would be granted authority to tender the advertised purchase price to a firm in order to gain immediate access to an advertised product so that an examination of the product may begin at once.

Third, the measure amends title 39, United States Code, to authorize imposition of a civil penalty in the amount up to, but not to exceed $10,000 per day against anyone who continue to engage in fraudulent schemes after having been found in violation of postal statutes and ordered to cease such activity.

## Section-by-Section Analysis

### SECTION 1

This act may be cited as the "Mail Order Consumer Protection Amendments of 1982."

### SECTION 2.—INSPECTION AUTHORITY

This section amends Chapter 4 of title 39, United States Code, by providing a new section 413, which authorizes the Postal Service, pursuant to a written demand, to inspect books and records that the Postal Service has reason to believe relate to any matter under investigation by the Postal Service pursuant to section 404(a)(7) of this title. Matters pertaining to Chapter 6 of title 39, private carriage of letters, and matters pertaining to the provisions of title 18 concerning the carriage of letters by private express are excluded from this authority. Written demands issued under this section shall describe with reasonable particularity the items sought to be examined and shall specify a reasonable time and place for making the inspection so as not to impose an unreasonable burden upon the party to be investigated. The Postal Service shall issue regulations for exercising its inspection authority under this section, after reasonable notice and comment. The inspection authority being granted the Postal Service is enforceable by any United States district court within the jurisdiction where a person is found, resides, receives mail, or otherwise transacts business.

### SECTION 3.—AMENDMENT TO SECTION 3005

This section amends section 3005 of title 39, United States Code, relating to false representations and lotteries to provide the Postal Service authority to issue certain orders to any person suspected of engaging in a scheme or device for obtaining money or property through certain mailings by mean of false representations, a lottery, gift enterprise, or scheme for the distribution of money, real, or personal property by lottery, chance, or drawing of any kind. Such orders shall direct postmasters to return mail to the sender appropriately marked as in violation of this section or to forbid the payment by a postmaster to such person of any money order drawn to pay for such material. The Postal Service would also be authorized to issue a cease and desist order to the person engaging in the scheme.

This section contains the provision that nothing in this section would prohibit the mailing of a newspaper of general circulation

containing advertisements, lists of prizes, or information concerning a lottery conducted under authority of State law.

This section provides that the public advertisement, by a person engaged in activities described by this section, that remittances may be made by mail to a person named in the advertisement is prima facie evidence that the latter is the agent or representative of the advertiser and the Postal Service may ascertain the existence of the agency relationship in a satisfactory legal manner.

This section provides that the term "representative" as used in this section is defined to include an agent or representative acting as an individual or as a firm, bank, corporation, or association of any kind.

This section provides that in conducting its investigations regarding false representations and lotteries the Postal Service may tender the price of any article or service that a person has offered for sale by mail. Upon the finding of the United States district court that there has been an unreasonable failure to provide the article or service to the Postal Service, such failure shall constitute probable cause to believe that the person is engaged in an activity for which mail could be detained under a court order, issued pursuant to section 3007.

This section provides that if the Postal Service issues to any person a written demand to inspect documents in the course of investigations to determine whether such a person is engaged in such activities, and if the United States district court determines that here has been an unreasonable refusal to comply with such demand it shall constitute probable cause that such person is engaged in activities for which mail could be detained under a court order, issued pursuant to section 3007.

This section provides that the Postal Service shall, after reasonable notice and comment, issue regulations regarding reasonable conditions for compliance with written demands to inspect documents or other items under this section.

SECTION 4.—CIVIL PENALTIES

This section amends Chapter 30 of title 39, United States Code, which relates to nonmailable matters, by adding a new subsection 3012, establishing civil penalties in an amount not to exceed $10,000 for each day of activity which constitutes a violation. Such penalties apply to any person who evades or attempts to evade an order issued under section 3005; any person who fails to comply with an order issued under section 3005; or any person who is in privity with a person who violates section 3005, and engages in conduct which assists any such person to evade or attempt to evade an order issued under section 3005. For purposes of this subsection, the use of any instrumentality of interstate commerce to resume an activity after a cease and desist order has been issued under section 3005 shall be considered a failure to comply with such order.

This section provides that the Postal Service is granted authority to commence a civil action before the district court of the United States in the district in which such conduct occurred or in which the defendant resides, transacts business, or receives mail, to enforce such civil penalties.

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This section provides that in determining the amount of any civil penalty the court shall consider the nature, circumstances, extent and gravity of the violation. The court shall also consider the ability of the violator to pay, the effect on the violator's ability to thereafter conduct lawful business, any history of prior violations, and any other matter as justice may require.

This section provides that enforcement of such civil penalties shall only apply with respect to conduct which occurs on or after the date of enactment of this Act.

SECTION 5.—ANNUAL STATEMENTS

This section amends section 2401(g) of title 39, United States Code, by requiring the Postal Service to include in its annual comprehensive statement to the Congress a report on its investigative activities, including a summary of matters referred for prosecution and the results thereof, the number of investigative demands issued, and a summary of administrative and civil actions initiated.

## Evaluation of Regulatory Impact

Paragraph 11(b)(1) of Rule XXVI requires each report accompanying a bill to evaluate "the regulatory impact which would be incurred in carrying out the bill."

The only regulatory impact associated with S. 1407, as amended, will result from the provision requiring the Postal Service to include in its annual comprehensive statement to the Congress a report on its investigative activities, including a summary of matters referred for prosecution and the results thereof, the number of investigative demands issued, and a summary of administrative and civil actions initiated.

This is not a new regulatory authority since the Postal Service in the past has included investigatory information in its annual statements.

S. 1407, as amended, does not authorize any additional regulations of activities in the private sector, impose any new record keeping or reporting requirements or any segment of the public, or abolish any existing regulations.

## Estimated Cost of the Legislation

Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed the cost implications of S. 1407, as amended. The following is CBO's estimate of the potential costs of this legislation:

U.S. Congress,
Congressional Budget Office,
*Washington, D.C., May 7, 1982.*

Hon. William V. Roth, Jr.,
*Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, D.C.*

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed

S. 1407, the Mail Order Consumer Protection Amendments of 1982, as ordered reported by the Senate Committee on Governmental Affairs, April 29, 1982.

S. 1407 broadens the inspection authority of the Postal Service regarding lotteries and false representations. It is expected that enactment of S. 1407 would result in no significant cost to the federal government.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

## ROLLCALL VOTES IN COMMITTEE

In compliance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the rollcall vote taken during committee consideration is as follows: 16 yeas; 0 nays

| YEAS—16 | NAYS—0 |
|---|---|
| Senator Percy | |
| Senator Stevens | |
| Senator Mathias | |
| Senator Danforth | |
| Senator Cohen | |
| Senator Durenberger | |
| Senator Mattingly | |
| Senator Rudman | |
| Senator Jackson | |
| Senator Chiles | |
| Senator Nunn | |
| Senator Glenn | |
| Senator Sasser | |
| Senator Pryor | |
| Senator Levin | |
| Senator Roth | |

## AGENCY COMMENTS

THE POSTMASTER GENERAL,
*Washington, D.C., December 2, 1981.*

Hon. WILLIAM V. ROTH, Jr.,
*Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This responds to your request for the views of the Postal Service on S. 1407, a bill designed to strengthen the investigatory and enforcement powers of the Postal Service.

If enacted, this legislation would bolster the effectiveness of the statutory provisions available to the Postal Service in its efforts to combat the growing variety and number of false representation schemes. The centerpiece of the present framework is section 3005 of title 39, which permits the Postmaster General, after an appropriate administrative hearing, to withhold and return to the sender mail addressed to anyone conducting a scheme to obtain money through the mails by means of

false representation. A companion statute, section 3007, makes it possible to obtain a temporary restraining order and preliminary injunction to withhold from delivery all mail of the operator of the scheme pending termination of the administrative proceeding. While these provisions are powerful weapons, their effectiveness has been lessened due to unavoidable time constraints involved in obtaining product samples necessary to initiate investigations, the lack of access to certain business records, and the ease with which operators can escape the reach of mail-stop orders once issued.

Obtaining an example of the item offered in the scheme, which is usually necessary to determine the truthfulness of an advertiser's claims, is time consuming and is often circumvented by promoters who delay shipment of any products until the scheme has run its course. Since only mail en route to the respondent may be subject to a mail-stop order, the order must issue within the effective drawing time of the advertiser's promotion if it is to afford any real protection to the consumer. Any mail-stop order subsequently issued, after the promoter has perhaps moved on to a new scheme or has reestablished the old scheme under a new name and address, has little practical value. Section 3 of S. 1407 would overcome this difficulty by authorizing the Postal Service to "tender at any reasonable time, and by any reasonable means, the price of any article or service . . . offered for sale by mail." The unreasonable failure by any such person to "provide" the requested article or service would constitute probable cause, for purposes of section 3007, that such person is using the mails in the furtherance of a misrepresentation scheme.

As an additional investigatory aid, the bill would authorize the Postal Service to "require, pursuant to a written demand" that "any officer or employee designated by the Potal Service be given access at reasonable times to inspect or copy any books, records, documents, or other objects that the Postal Service has reason to believe relate to any matter under investigation by the Postal Service" pursuant to its authority to investigate postal offenses. Should a "written demand" be denied, the matter could be presented to the appropriate district court along with a request that the court order such person to comply with the demand; a failure to obey the court's order would be punishable as a contempt of court.

Such authority would enhance the effectiveness of the misrepresentation statute by enabling it to be applied to schemes which are, at present, virtually immune. For example, false billing schemes, where the promoter mails out bills stating or implying some pre-existing obligation of the addressee to pay, are currently difficult to prove because the promoter is able to contend that the relatively few complaints allegedly representing the scheme are mere aberrations. Access to the promoter's books and records would reveal whether the claimed pre-existing obligations existed. In addition, mail order merchants who systematically fail to deliver merchandise within limits expressed or implied by their advertising or who fail completely to honor some portion of the orders they solicit and receive may contend that the product was delayed or lost in the mails. In these and other cases where the facts necessary to prove or disprove a case are in the

exclusive possession of the promoter or some person who does not choose to cooperate, the proposed demand authrity would greatly improve the likelihood of reaching the truth.

Finally, S. 1407 would provide much-needed penalty provisions as a means of discouraging evasion of mail-stop orders issued under section 3005. By simply republishing the advertisement subject to the stop order and using a new name or address, the promoter may continue to mislead the public. If an operator is using an identical advertisement and product, further proceedings are necessary to obtain a "supplemental order" which adds the new address to the pre-existing order. If the new promotion involves any material changes in the product or the advertising claims, a new proceeding under the statute must be initiated. In either case, delays occur allowing the promoter to receive mail bearing the fruits of the scheme despite the previous order. Section 4(a) would authorize the Postal Service to impose a civil penalty for each violation of a mail-stop order by a person subject to the order or by any person, except publishers of newspapers and periodicals, having actual knowledge of the order and in privity with the person whose conduct was subject to the order. Fraudulent promoters would therefore be discouraged from masking their enterprises and continuing in business. Imposition of a penalty would be conditioned upon granting the operator prior notice and an opportunity to be heard; appeal of an adverse decision could be taken to a United States Court of Appeals.

The Postal Service believes S. 1407 would significantly improve the ability of the Postal Service to deal with mail-order schemes which cheat the consumer through false representations. Accordingly, the Postal Service supports this legislative initiative and urges that it be enacted.

Sincerely,

WILLIAM F. BOLGER.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no changes is proposed is shown in roman):

# TITLE 39, UNITED STATES CODE

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## PART I—GENERAL

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### CHAPTER 4. GENERAL AUTHORITY

Sec.
401. General powers of the Postal Service
402. Delegation of authority
403. General duties

404. Specific powers
405. Printing of illustrations of United States postage stamps
406. Postal services at Armed Forces installations
407. International postal arrangements
408. International money-order exchanges
409. Suits by and against the Postal Service
410. Application of other laws
411. Cooperation with other Government agencies
412. Nondisclosure of lists of names and addresses
413. Inspection authority

### § *413. Inspection authority*

*(a) The Postal Service may require, pursuant to a written demand made under this section, that any officer or employee designated by the Postal Service be given access at reasonable times to inspect or copy any books, records, documents, or other objects that the Postal Service has reason to believe relate to any matter (except a matter pertaining to chapter 6 of this title or to the provisions of title 18 concerning the carriage of letters by private express) under investigation by the Postal Service pursuant to its authority under section 404(a)(7) of this title. Any written demand under this section shall describe with reasonable particularity the items sought to be examined, and shall specify a reasonable time and place for making the inspection. No written demand issued under this section may impose an unreasonable burden upon the party to whom the demand is issued. The Postal Service shall, after reasonable notice and opportunity for interested parties to comment, issue regulations providing procedures and conditions for exercising its inspection authority under this section.*

*(b) If a person issued a written demand under subsection (a) refuses to obey such demand, any district court of the United States within the judicial district within which such person is found, resides, receives mail, or otherwise transacts business, may (upon application by the Postal Service) order such person to comply with the written demand issued under subsection (a). Any failure to obey such order of the court may be punished by the court as a contempt thereof.*

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## PART III--MODERNIZATION AND FISCAL ADMINISTRATION

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## CHAPTER 24. APPROPRIATIONS AND ANNUAL REPORT

Sec.
2401. Appropriations
2402. Annual report

### § 2401. Appropriations

(a) There are appropriated to the Postal Service all revenues received by the Postal Service.

(b)(1) As reimbursement to the Postal Service for public service costs incurred by it in providing a maximum degree of effective and regular postal service nationwide, in communities where post offices may not be deemed self-sustaining, as elsewhere, there are authorized to be appropriated to the Postal Service the following amounts:

(A) for each of the fiscal years 1972 through 1979, an amount equal to 10 percent of the sum appropriated to the former Post Office Department by Act of Congress for its use in fiscal year 1971;

(B) for fiscal year 1980, an amount equal to 9 percent of such sum for fiscal year 1971;

(C) for fiscal year 1981, $486,000,000;

(D) for fiscal year 1982, $250,000,000;

(E) for fiscal year 1983, $100,000,000;

(F) for fiscal year 1984, no funds are authorized to be appropriated; and

(G) except as provided in paragraph (2) of this subsection, for each fiscal year thereafter an amount equal to 5 percent of such sum for fiscal year 1971.

(2) After fiscal year 1984, the Postal Service may reduce the percentage figure in paragraph (1)(G) of this subsection, including a reduction to 0, if the Postal Service finds that the amounts determined under such paragraph are no longer required to operate the Postal Service in accordance with the policies of this title.

(3) [Repealed].

(c) There are authorized to be appropriated to the Postal Service each year a sum determined by the Postal Service to be equal to the difference between the revenues the Postal Service would have received if sections 3217, 3403–3405, and 3626 of this title, the Overseas Citizens Voting Rights Act of 1975, and the Federal Voting Assistance Act of 1955 had not been enacted and the estimated revenues to be received on mail carried under such sections and Acts. In requesting an appropriation under this subsection for a fiscal year, the Postal Service shall include an amount to reconcile sums authorized to be appropriated for prior fiscal years on the basis of estimated mail volume with sums which would have been authorized to be appropriated if based on the final audited mail volume.

(d)(1) There is authorized to be appropriated to the Postal Service for fiscal year 1976 and for the period beginning July 1, 1976, and ending September 30, 1976, the amount of $500,000,000 to be applied against the accumulated operating indebtedness of the Postal Service as of September 30, 1976.

(2) There is authorized to be appropriated to the Postal Service for fiscal year 1977 the amount of $500,000,000 to be applied against the accumulated operating indebtedness of the Postal Service as of September 30, 1977.

(e) During the period beginning on the date of the appropriation of the funds under subsection (d)(1) and ending on the date on which the Commission on Postal Service is required to transmit the final report required under section 7(f)(1) of the Postal Reorganization Act Amendments of 1976 [39 USC § 3661 note] to the President and each House of Congress, the Postal Service shall not—

(1) have in effect any permanent or temporary rate of postage or fee for postal services exceeding the rates and fees in effect on the date of enactment of the Postal Reorganization Act Amendments of 1976 [enacted Sept. 24, 1976];

(2) provide levels and types of postal services which are less than the levels and types of services provided on July 1, 1976;

(3) close any post office where 35 or more families regularly receive their mail and which was providing service on July 1, 1976; or

(4) close any post office where fewer than 35 families receive their mail and which was providing service on July 1, 1976, unless the Postal Service receives the written consent of at least 60 percent of the regular patrons of such office who are at least 18 years of age.

(f) During the period beginning on the date of the appropriation of the funds under subsection (d)(1) and ending on the date on which the Commission on Postal Service is required to transmit the final report required under section 7(f)(1) of the Postal Reorganization Act Amendments of 1976 [39 USCS § 3661 note] to the President and each House of Congress, the Postal Service shall provide door delivery or curbline delivery to all permanent residential addresses (other than apartment building addresses) to which service is begun on or after the date of enactment of the Postal Reorganization Act Amendments of 1976 [enacted Sept. 24, 1976].

(g) The Postal Service shall present to the Committees on Post Office and Civil Service and the Committees on Appropriations of the Senate and the House of Representatives, at the same time it submits its annual budget under section 2009 of this title [39 USCS § 2009], sufficient copies of the budget of the Postal Service for the fiscal year for which funds are requested to be appropriated, and a comprehensive statement relating to the following matters:

(1) the plans, policies, and procedures of the Postal Service designed to comply with all of the provisions of section 101 of this title [39 USCS § 101];

(2) postal operations generally, including data on the speed and reliability of service provided for the various classes of mail and types of mail service, mail volume, productivity, trends in postal operations, and analyses of the impact of internal and external factors upon the Postal Service;

*(3) investigative activities of the Postal Service, including a statistical summary of matters referred for prosecution and the results thereof, the number of investigative demands issued pursuant to section 413 of this title, and a statistical summary of administrative and civil actions initiated pursuant to sections 3005 and 3007 of this title;*

[(3)] *(4)* a listing of the total expenditures and obligations incurred by the Postal Service for the most recent fiscal year for which information is available, an estimate of the total expenditures and obligations to be incurred by the Postal Service during the fiscal year for which funds are requested to be appropriated, and the means by which these estimated expenses will be financed; and

[(4)] *(5)* such other matters as the committees may determine necessary to ensure that the Congress is fully and currently consulted and informed on postal operations, plans, and policies.

Not later than March 15 of each year, the Postal Service shall appear before the Committees on Post Office and Civil Service of the Senate and the House of Representatives to submit information which any such committee considers necessary to determine the amount of funds

to be appropriated for the operation of the Postal Service, and to present testimony and respond to questions with respect to such budget and statement. Each such committee shall take such action as it considers appropriate and shall advise the Postal Service of such action.

(h) The failure of the President to request the appropriation of any part of the funds authorized by this section may not be deemed a failure of appropriations. The failure of the President to request the appropriation of any part of the funds authorized by this section shall not relieve the Postal Service from the responsibility to comply with the provisions of subsections (e) and (f) of this section.

(i) The rates established under chapter 36 of this title for zone-rated parcels formerly entered under former chapter 67 of this title shall not be more than 10 percent less than the rates for such mail would be if the funds authorized under subsections (b) and (d) of this section were not appropriated.

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# PART IV. MAIL MATTER

## CHAPTER 30. NONMAILABLE MATTER

Sec.
3001. Nonmailable matter
3002. Nonmailable motor vehicle master keys
3003. Mail bearing a fictitious name or address
3004. Delivery of mail to persons not residents of the place of address
3005. False representations; lotteries
3006. Unlawful matter
3007. Detention of mail for temporary periods
3008. Prohibition of pandering advertisements
3009. Mailing of unordered merchandise
3010. Mailing of sexually oriented advertisements
3011. Judicial enforcement
*3012. Civil penalties*

### § 3005. False representations; lotteries

(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, including the mailing of matter which is nonmailable under section 3001(d) of this title, or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which—

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

For purposes of the preceding sentence, the mailing of matter which is nonmailable under such section 3001(d) by any person shall constitute prima facie evidence that such person is engaged in conducting a scheme or device for obtaining money or property through the mail by false representations.

(b) The public advertisement by a person engaged in activities covered by subsection (a) of this section, that remittances may be made by mail to a person named in the advertisement, is prima facie evidence that the latter is the agent or representative of the advertiser for the receipt of remittances on behalf of the advertiser. The Postal Service may ascertain the existence of the agency in any other legal way satisfactory to it.

(c) As used in this section and section 3006 of this title, the term "representative" includes an agent or representative acting as an individual or as a firm, bank, corporation, or association of any kind.

(d) Nothing in this section shall prohibit the mailing of (1) a newspaper of general circulation containing advertisements, lists of prizes, or information concerning a lottery conducted by a State acting under authority of State law, published in that State, or in an adjacent State which conducts such a lottery, or (2) tickets or other materials concerning such a lottery within that State to addresses within that State. For the purposes of this subsection, "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.]

*(a)(1) The Postal Service may issue an order described under paragraph (1) or (2) of subsection (b), or both such orders, upon determining on the basis of evidence satisfactory to the Postal Service that any person—*

*(A) is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, including the mailing of matter which is nonmailable under section 3001(d) of this title; or*

*(B) is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind.*

*The mailing by any person of matter which is nonmailable under section 3001(d) shall constitute prima facie evidence that such person is engaged in conducting a scheme or device described by subparagraph (A).*

*(2) Nothing contained in this subsection shall prohibit the mailing of—*

*(A) a newspaper of general circulation containing advertisements, lists of prizes, or information concerning a lottery conducted by a State acting under authority of State law, published in that State, or in an adjacent State which conducts such a lottery; or*

*(B) tickets or other materials concerning such a lottery within that State to addresses within that State.*

*As used in this paragraph, the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.*

*(b) When permitted under subsection (a), the Postal Service may issue—*

*(1) an order which—*

*(A) directs the postmaster of the post office at which mail arrives, addressed to any person engaged in an activity described by subsection (a)(1) (or to any representative of such person), to return such mail to the sender appropriately marked as in violation of this section if such person or representative is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and*

*(B) forbids the payment by a postmaster to such person or representative of any money order drawn to the order of either, and provides for the return to the remitter of the sum named in the money order; or*

*(2) an order which requires any person (or representative of such person) engaged in an activity described by subsection (a)(1) to cease and desist from such activity.*

*(c)(1) The public advertisement by a person engaged in activities described by subsection (a)(1) that remittances may be made by mail to a person named in the advertisement is prima facie evidence that the latter is the agent or representative of the advertiser for the receipt of remittances on behalf of the advertiser. The Postal Service may ascertain the existence of the agency relationship in any other legal way satisfactory to it.*

*(2) As used in this section and in section 3006 of this title, the term "representative" includes an agent or representative acting as an individual or as a firm, bank, corporation, or association of any kind.*

*(d)(1) In conducting investigations to determine whether any person is engaged in activities described by subsection (a)(1), the Postal Service (or any duly authorized agent of the Postal Service) may tender at any reasonable time, and by any reasonable means, the price of any article or service that such person has offered for sale by mail. If the United States district court determines that there has been an unreasonable failure by any such person to provide the article or service to the Postal Service or its agent upon the tender of the advertised price of the article or service, such failure shall, for purposes of section 3007 of this title, constitute probable cause to believe that such person is engaged in activities described by subsection (a)(1).*

*(2) If the Postal Service issues to any person a written demand, under section 413 of this title, to inspect documents or other items in the course of investigations to determine whether such person is engaged in activities described by subsection (a)(1), and if the United States district court determines that there has been an unreasonable refusal, such refusal by such person to comply with such demand shall, for purposes of section 3007 of this title, constitute probable cause to believe that such person is engaged in activities described by such subsection.—*

*(3) The Postal Service shall, after reasonable notice and opportunity for interested parties to comment, issue regulations regarding reasonable conditions for compliance with written demands to inspect documents or other items under paragraph (2), and reasonable conditions for providing the article or service involved upon tender of the advertised price under paragraph (1).*

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**§ 3012. Civil penalties**

(a) *Any person—*

(1) *who evades or attempts to evade the effect of an order issued under section 3005(b)(1);*

(2) *who fails to comply with any order issued under section 3005(b)(2); or*

(3) *who (other than a publisher described by section 3007(b)) has actual knowledge of any such order, is in privity with any person described by paragraph (1) or (2), and engages in conduct which assists any such person to evade, attempt to evade, or fail to comply with any such order (as the case may be);*

*shall be liable to the United States for a civil penalty in an amount not to exceed $10,000 for each day that such person engages in conduct described by paragraph (1), (2), or (3). If orders are issued under both paragraphs (1) and (2) of section 3005(b) with respect to any activity described under section 3005(a), separate penalties may be assessed under this subsection for conduct described by paragraphs (1) and (2) of this subsection. The resumption through use of any instrumentality of interstate commerce of any activity with respect to which a cease and desist order has been issued under section 3005(b)(2) of this title shall, for purposes of this subsection, be considered to be a failure to comply with such order.*

(b)(1) *Whenever, on the basis of any information available to it, the Postal Service finds that any person is engaging in conduct described by paragraph (1), (2), or (3) of subsection (a), the Postal Service may commence a civil action to enforce the civil penalties established under such subsection. Any such action shall be brought in the district court of the United States for the district in which such conduct occurred or in which the defendants resides, transacts business, or receives mail.*

(2) *In determining the amount of any civil penalty, the court shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to conduct lawful business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.*

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